PEH KONG WAN, RE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[BANKRUPTCY NO. 29-8873/1988]
29 MAY 1992

BANKRUPTCY: *Setting aside receiving order and adjudicating order - Service of bankruptcy notice - Substituted service - Averment in petition debtor "is domiciled in the Federation or within one (1) year before the date of presentation of the petition has ordinarily resided in the Federation" - Averment disputed - Whether ordinarily resident or domiciled in Malaysia.*

The petitioner bank, P, had obtained judgment against the appellant, B, on 21 September 1976. 12 years later on 8 March 1988 P obtained leave to enforce judgment and thereafter attempted to serve the bankruptcy notice on B by substituted service. The order for substituted service required a copy of the bankruptcy notice to be posted at an address referred to as premises of B, on the Court's notice board and by advertisement. The order for substituted service was obtained on averments by the Counsel conducting the matter that to the best of her knowledge and belief B was within the States of Malaya although no basis for this information, knowledge or belief was disclosed. It was also averred that B "is domiciled in the federation or within one year before date of presentation of petition has ordinarily resided in the federation". B was absent when the petition was called on 14 September 1988 and accordingly the petition was treated as unopposed and the receiving and adjudicating orders were ordered.

On 4 December 1991 B sought to set aside the receiving order and adjudicating order by this motion. In B's affidavit in support, B stated that he was unaware of the petition and since 1976 was not ordinarily residing nor domiciled in the federation. B also stated that he does not have any property here or has carried on business here personally or by servant or agent or in partnership.

There was evidence that the process server in effecting the substituted service by posting the bankruptcy notice at the last known address was informed that B did not reside there and further there was no evidence of advertisement of the bankruptcy notice.

Held:

[1] As B had left the country in 1976, in all probability B did not know of the bankruptcy proceedings and this satisfactorily explained the lapse of time in filing the application.

[2] Where it is known or ought to be known that the respondent has ceased to reside at the last known address, the Registrar should be provided with some evidence as to the probable whereabouts of the respondent. If suspected out of jurisdiction, that suspicion should be brought to the attention of the Court so that the order for substituted service could be formulated to that end that the respondent would in all probability get to know of the bankruptcy notice or the presentation of the petition as the case may be. Here, there had been failures to make reasonable enquiries as to the whereabouts of B despite being reported by the process server that B did not reside at the last known address. In all probability, had reasonable enquiries been made, P would have known that B was not in the federation as averred.

[3] As B had shown that since 1976 he abandoned all connection with Malaysia save returning to Malaysia to have his passport renewed and the fact he had obtained permanent resident status in Singapore B had established both primus to his change of domicile from Malaysia to Singapore.

[4] Had the above facts been before the Court when the petition was disposed of, in all probability the petition would have been refused. Therefore B ought not to have been adjudged bankrupt.

[Adjudicating order annulled and receiving order rescinded. Each party to bear own costs of and incidental to the petition.]

Obiter: **1**. Although terms of the orders for substituted service were unsatisfactory they were orders of the Court and accordingly there was due service of bankruptcy notice and of petition.

2. The manner in which substituted service is to be effected has to be meaningful and not treated as meaningless formality.

Cases referred to:
Johnson, In Re Roberts v. AG [1903] 1 Ch 821 ***(cit)***
Ramsay v. Liverpool Royal Infirmary [1930] AC 588 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 5(1)(d), 105(5), (1)
Bankruptcy Rules 1969, rr. 109, 110, 113

For the petitioner - Sitpah Selvaratnam; M/s. Skrine & Co.
For the judgment debtor - Lau Kok Guan; M/s. Lau Kok Guan & Partners

JUDGMENT

VC George J:

This motion dated 4 December 1991 is by the bankrupt Peh Kong Wan seeking to have set aside the receiving order and the adjudication order entered against him on 14 September 1988.

On 21 September 1976, the petitioner bank had obtained judgment against Peh and his co-defendants in the sum of RM1.5 million with interest and costs.

Almost 12 years later, on 8 March 1988, the bank obtained leave to enforce the judgment. Thereafter they attempted to serve a bankruptcy notice on Peh. This was eventually effected by substituted service - by posting a copy of the notice on the front door of No. 7, Lorong Batai Tepi, Kuala Lumpur, referred to as the premises of the judgment debtor and on the Court's notice board and by advertisement, the order for which was obtained on the averment by the advocate and solicitor having the conduct of the matter that to the best of her information, knowledge and belief, Peh was within the States of Malaya. The basis for this information, knowledge and belief was not disclosed. There being no response to the bankruptcy notice the petition was presented. In paragraph 1 of the petition it was averred that Peh "is domiciled in the Federation or within one (1) year before the date of presentation of the petition has ordinarily resided in the Federation.

The petition was also served by way of substituted service by posting a copy thereof on the Court's notice board and on the front door of No. 7, Lorong Batai Tepi, Kuala Lumpur again referred to as the judgment debtor's premises.

When the petition was called for disposal on 14 September 1988 the respondent was absent and accordingly the petition was treated as an unopposed petition and receiving and adjudication orders were made.

By affidavit in support of this motion Peh in effect says that he was unaware of the petition having been presented against him and that since 1976 he has not been ordinarily residing in Malaysia and that he "was not domiciled in the Federation within one year before the date of presentation of the petition" and that accordingly the petitioner in fact had not been entitled to have presented the petition because s. 5(1)(d) of the Bankruptcy Act provides that:

> A creditor shall not be entitled to present a bankruptcy petition against a debtor unless -
>
> (d) the debtor is domiciled in the Federation or in a State or within one year before the date of the presentation of the petition had ordinarily resided or had a dwelling house or place of business in the Federation or has carried on business in the Federation personally or by means of an agent or is or has been within the same period a member of a firm of partnership which has carried on business in the Federation by means of a partner or partners or an agent or manager.

Peh has to first of all give a satisfactory explanation for the lapse of time between his having been made a bankrupt and this application. If he succeeds in doing that, in the context of this application, he has to next satisfy the Court that at the relevant time he did not fall within any of the terms of s. 5(1)(d).

The affidavit evidence shows that in 1976 Peh had left Malaysia and his family had accompanied him. In that year he sought and obtained permanent resident status in Singapore. Initially he worked in Singapore and in Hong Kong. In 1988 he went to work in Jakarta. After he left Malaysia, according to Peh, he ceased to have a dwelling house here and he did not carry on an business here. He says that he did not and does not have any property here and apart from his guarantee the subject of the judgment he had and has no liabilities here.

The Court file shows that in seeking to effect service on Peh at his last known address the bank's process server was told in April 1988 that Peh no longer resided there and that the house was occupied by the then Minister of Health. It seems not improbable that a bankruptcy notice against him had been posted on the front door of that house and on the Court's notice board and the fact of the advertisement of the notice were not brought to Peh's notice particularly having in mind that some 12 years earlier Peh had left the country. Service of the petition was also by posting on the door of the Minister's house and on the Court's notice board. It was not even advertised.

The evidence before the Court proves that Peh had left the country in 1976. It proves that he took up permanent residence in Singapore. I am satisfied that Peh has been working in Singapore and Hong Kong and more recently in Jakarta where he still is. I am satisfied that since about 1976 Peh ceased to ordinarily reside in Malaysia and that since then he has not had a dwelling house or a place of business here or has carried on business here personally or by a servant or agent or in partnership. I am also satisfied that in all probability Peh did not know of the bankruptcy proceedings against him and that satisfactorily explains the lapse of time in filing this application.

One disturbing aspect of this case was the manner in which the service of the process was effected. The Bankruptcy Rules prescribe rules in respect of the service of the petition. Rule 109 provides that service of the petition has to be personal service. Rule 110 provides for

substituted service. Substituted service is granted where "the debtor is keeping out of the way to avoid service ... or for an other cause ...". There is a further rule, r. 113, that deals with service of the petition out of the jurisdiction. The Court orders the service out of the jurisdiction to be made within such time and in such manner and form as it thinks fit. Where the respondent is out of the jurisdiction of the Court r. 113 has to be invoked.

Although no longer looked upon as a crime as it once was, bankruptcy involves a change of status and carries with it quasi-penal consequences. The bankrupt becomes subject to certain disqualifications in respect of his civil rights and public offices. It follows that the Courts must be vigilant to ensure that there is no compromise in respect of the meeting of procedural requirements not only on the letter of them but in the spirit of such requirements. In particular in respect of applications for substituted service where it is known or ought to be known that the respondent has ceased to reside in the last known address (as was the case here) the Registrar should be provided with some evidence as to the probable whereabouts of the respondent. The petitioner should make reasonable enquiries as to the whereabouts of the respondent and if it is suspected that he is out of the jurisdiction that suspicion should be brought to the attention of the Court so that the order for substituted service could be formulated to the end that the respondent will in all probability get to know of the fact of the bankruptcy notice or the presentation of the petition as the case may be. A case in point is the instant case where the process server reported that a policeman on duty at the last known address of the respondent informed the process server that the respondent did not reside there and that it was the residence of the Minister of Health. In the circumstances it seems pointless to have ordered that there be a posting of the legal process on the front door of the Minister's residence. In my view the petitioner (and its agents) could and should have made enquiries as to what had become of the respondent. It seems to me if that had been effectively done, in all probability it would have been known that the respondent had moved to Singapore and the order for substituted service could have included a need to advertise in the Singapore press. The manner in which substituted service is to be effected has to be meaningful and not treated as a meaningless formality.

What then is left for decision is whether Peh was at the time of the presentation of the petition domiciled here or within one year before the presentation of the petition ordinarily resident here as averred in the petition to meet the terms of s. 5(1)(d).

As the principles of English law in respect of the domicil of a person obtains here we could look at English decisions for guidance. Farwell J said in *Johnson, In Re Roberts v. A.G.* [1903] 1 Ch. 821 at 826:

> It is a settled principle of English law that no one shall be without a domicil. Every one takes at birth the domicil of his father, if he be legitimate, of his mother if illegitimate, and he may in later life acquire a domicil of choice. But until he does so, or if he abandons his domicil of choice, his domicil of origin remains or revives. To quote Lord Watson [1903] 1 Ch. 821 at 826: 'Lord Westbury in *Udny v. Udny* - L.R.1 H.L.Sc.458 - said, 'Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time'.

More authoritatively Viscount Dunedin said in the House of Lords in *Ramsay v. Liverpool Royal Infirmary* [1930] AC 588 at 594:

> My Lords, it has again and again been laid down that a change of domicil from the domicil of origin must be made *animo et facto*.

In that same case Lord Thankerton said at p. 595:

> Admittedly the appellant undertakes the burden of proving that George Bowie acquired an English domicil *animo et facto*; his long residence establishes the factum, but there remains the question of the animus. It seems clear on the authorities that mere length of residence by itself is insufficient evidence from which to infer the animus; but the quality of the residence may afford the necessary inference. For instance, the purchase of a house or estate coupled with long residence therein and non-retention of any home in the domicil of origin, might be sufficient to prove the intention to acquire a new domicil.

In dealing with questions of domicil, in this day and age, the Court can and should take the stringent immigration laws most if not all countries have. Gone are the days when one could at one's own pleasure move into some country of one's choice to reside there for periods of time as one chooses. Applications for permanent residence in most countries call for *inter alia* in effect satisfying the host country that it is the applicant's wish that the host country becomes his domicil of choice.

In the instant case Peh has shown that he had since 1976 abandoned all connections with Malaysia save retaining his Malaysian passport and has sought and obtained permanent residence status in Singapore. Obtaining such a status and effecting a change of domicil does not necessarily entitle one to citizenship and accordingly it is understandable that one has to and holds on to one's passport. Peh says without challenge that he only visits Malaysia when it is necessary for him to have his passport renewed.

In my judgment, Peh had established both the animus to change his domicil from Malaysia to Singapore and the factum of having effected the change.

There was some evidence that Peh had permission to reside in Australia. That ***per se*** does not amount to a further change of his status. In respect of that there is neither the factum nor an animus of any further change of domicil.

If these facts were before the Court when the petition was disposed of, in all probability the petition would have been refused. It follows that it is the opinion of this Court that Peh ought not to have been adjudged bankrupt. Section 105(1) of the Act empowers the Court in those circumstances to annul the adjudication and if the Court does so by s. 105(5) it shall also rescind the receiving order.

Accordingly the adjudication order of 14 September 1988 is annulled and the receiving order of that date is rescinded. Although the terms of the orders for substituted service were unsatisfactory they were orders of the Court and accordingly there was due service of the bankruptcy notice and of the petition. In the circumstances the petitioner was entitled to request the Court to treat the petition as an unopposed petition. In those circumstances I think that each party shall bear its own costs of and incidental to the petition. There will be liberty to apply in respect of any matter consequential to the said annulment and rescission.

Also found at [1992] 3 CLJ 1747